

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION
(Pre-Publication of Notice of Statement)

Add Section 749.2, Title 14, California Code of Regulations,
Re: Incidental Take of Xantus's Murrelet
(*Synthliboramphus hypoleucus*) During Candidacy Period

- I. Date of Initial Statement of Reasons: January 31, 2003
- II. Dates and Locations of Scheduled Hearings:
- (a) Notice Hearing: Date: February 6, 2003
Location: Sacramento
- (b) Discussion/Adoption Hearing: Date: May 8, 2003
Location: Riverside
- III. Description of Regulatory Action:
- (a) Statement of Specific Purpose of Regulatory Change and Factual Basis for Determining that Regulatory Change is Reasonably Necessary:
- The Fish and Game Commission (Commission) is the decision-making body that implements the California Endangered Species Act (CESA). As described in greater detail below, CESA authorizes the Commission to establish lists of threatened and endangered species, and to add or remove species from the lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code (FGC), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Game (Department) and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on four previous occasions: in 1994 for the southern torrent salamander, in 1994 for the coho salmon south of San Francisco, in 1997 and 1998 for the spring-run chinook salmon and in 2000 for coho salmon throughout its range in California.
- On April 16, 2002, the Commission received a petition from the Pacific Seabird Group to list Xantus's murrelet as a threatened species under

CESA. The Pacific Seabird Group is a society of professional seabird researchers and managers dedicated to the study and conservation of seabirds. The petition describes: (1) the small U.S. and world population; (2) its geographically restricted breeding range; (3) declines at the largest U.S. colony at Santa Barbara Island; and (4) abundant and increasing major threats to murrelets.

The Commission referred the petition to the Department on April 25, 2002, for a 90-day review period, as required by Section 2073, FGC. The Department requested and received a 30-day extension of the review period as allowed by Section 2073.5 (b), FGC. The Department determined on August 22, 2002, that there was sufficient information in the petition to indicate that the Xantus's murrelet's listing may be warranted and, based on that determination, recommended that the Commission accept the petition. As described in the evaluation report, the Department relied on information and data in its files to interpret information in the petition.

On October 23, 2002, the Commission decided to accept the Xantus's murrelet as a candidate species based on the Department's evaluation report, public testimony, and the information in the petition. The petition identifies the following activities as factors in the decline of Xantus's murrelet: introduced mammals, oil pollution, native predators, and artificial light pollution. Other threats listed in the petition include human disturbance at colonies, oceanographic and prey changes, military operations, and bycatch in fisheries.

Sections 2080 and 2085, FGC, prohibit the take of candidate species, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to Section 2084, FGC, or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis. Because the Commission designated the Xantus's murrelet as a candidate species on October 23, 2002, individuals and entities engaged in any activity that may result in incidental take of Xantus's murrelet, including the activities listed above, are at risk of citation for unauthorized take. The Commission took action to adopt emergency regulations to authorize take at the October 23, 2002 meeting and Section 749.2, Title 14, CCR, was filed with the Office of Administrative Law effective November 7, 2002. In the absence of these regulations, individuals engaged in otherwise lawful activities that may result in take of Xantus's murrelet would have to obtain a permit from the Department in order avoid liability and potential criminal violations of CESA for actions or activities that result in take of the candidate species. On February 6, 2003, the Commission took action to extend these regulations for an additional 120 days. These regulations will expire in July 2003 if not adopted as permanent.

The Department requests that the Commission add Section 749.2, Title 14, CCR, to authorize and provide for take of Xantus's murrelet during its candidacy under CESA as follows:

1. During the candidacy period incidental take of Xantus's murrelet resulting from night-time (dusk to dawn) operation of a vessel is authorized prior to February 1 and after July 15 within the areas from the mean high tide line extending 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands and is authorized at any time outside of the areas from the mean high tide line extending 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands.
2. Incidental take of Xantus's murrelet resulting from night-time operation of a vessel from February 1 to July 15 within the areas from mean high tide to 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands is authorized only where such take occurs in compliance with each of the following restrictions:

Vessels are not engaged in night fishing or night diving;

External loud speakers on the vessels are not in use;

Vessels are within a designated anchorage or safe harbor during the night, except when transiting through the areas specified in the regulations; and

Lighting on the vessels is limited to navigational lighting necessary for safe operations.

3. Take of Xantus's murrelet in the course of ongoing research and monitoring of this species by public agencies other than the Department and by private parties is authorized provided that, for such ongoing research, a written, detailed project progress report is provided to the Department.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 200, 202, 205, and 2084, Fish and Game Code.

Reference: Sections 200, 202, 205, 2080, 2084 and 2085, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change: None.

(d) Identification of Reports or Documents Supporting Regulation Change:

California's Living Marine Resources, Marine Bird Resources, pp. 541-550, December 2001,
Petition Evaluation Report for Xantus's Murrelet, CDFG, August 22, 2002.

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

Fish and Game Commission Meetings:
October 23, 2003, Santa Barbara.
February 6, 2003, Sacramento.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

Issue individual permits authorizing incidental take. The issuance of individual permits authorizing incidental take is a complicated, lengthy, and expensive process, and the Commission specifically finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the multitude of activities that will otherwise be prohibited during the Xantus's murrelet's candidacy period. The Department has testified that the species is not, in its opinion, at immediate risk of extinction. At the same time, these continuing regulations include conditions designed to protect Xantus's murrelet that apply to all covered activities. For these reasons, a continuation of the regulations is necessary to allow economic and recreational activities to continue within the area covered by the petition while ensuring appropriate interim protections for Xantus's murrelet while the Department conducts a 12-month review of the status of the candidate species subject to the petition.

(b) No Change Alternative:

If the Commission does not adopt regulations to allow for incidental take, either via regulation or on a project-by-project basis, then any individual engaged in otherwise legal activities would be prohibited from engaging in those activities that may result in the incidental take of Xantus's murrelet during its candidacy period.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Approximately 183 market squid vessel permittees and 39 light boat permittees, and on the order of two dozen commercial passenger fishing vessels (CPFVs) could be impacted by the regulations to exclude light and noise activities during night-time hours within 1 nautical mile of Santa Barbara and Anacapa islands during the Xantus's murrelet's breeding season (February 1 through July 15). Because both these sectors of the fishing industry can and do operate in and around the waters of other islands and the coastline, it is difficult to estimate the actual total cost of impacts. However, data from log books submitted by vessel operators provide us with some indication that the impacts would be minimal.

For the squid fishery, the impacts should be relatively small because the fishery in southern California generally operates in other areas during the late winter. From squid fishery log books for the period May 2000 to September 2002, less than 1 percent of catches was reported from both Anacapa and Santa Barbara islands during the two February to July 15 periods.

The impacts would be somewhat different between CPFV dive and CPFV finfish sectors of the industry but should also be small because the restricted area around these two smaller islands is a small part of the total area within 1 nautical mile around all eight Channel Islands. From CPFV

log books for 2000 and 2001, only 29 dive trips and 18 finfish trips occurred at night at Anacapa Island during February through July. This is less than 3 percent and 1 percent, respectively, of the total dive trips and finfish trips at all eight Channel Islands during this same period. At Santa Barbara Island, only 17 dive trips and 157 finfish trips occurred at night during the same period. This is less than 2 percent and 3.5 percent, respectively, of the total dive and finfish trips at all eight Channel Islands during February through July.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California: None.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

- (e) Nondiscretionary Costs/Savings to Local Agencies: None.

- (f) Programs Mandated on Local Agencies or School Districts: None.

- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.

- (h) Effect on Housing Costs: None.

Informative Digest/Policy Statement Overview

The objective of these regulations is to allow a variety of activities to continue on an interim basis, subject to the measures in the regulations designed to protect Xantus's murrelet (*Synthliboramphus hypoleucus*) during the candidacy period. Continuation of the regulations will allow the Department to focus its efforts on evaluation of the status of the species. The Department's evaluation of the species during the candidacy period will result in a status report regarding the species, which will provide a basis for the Department's recommendation to the Commission regarding the species' appropriate long-term status under California Endangered Species Act (CESA).

The proposed regulations would authorize and provide for take of Xantus's murrelet during its candidacy under CESA as follows:

1. The incidental take of Xantus's murrelet resulting from night-time (dusk to dawn) vessel operation between July 16 and January 31 is authorized within the areas from the mean high tide line extending 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands.
2. The incidental take of Xantus's murrelet resulting from night-time vessel operation is authorized at any time outside of 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands.
3. The incidental take of Xantus's murrelet resulting from night-time vessel operation between February 1 and July 15 within the areas from mean high tide to 1 nautical mile around the entire shoreline of Santa Barbara and Anacapa islands is authorized only if the vessel is in compliance with each of the following restrictions:
 - (a) The vessel is not engaged in night fishing or night diving;
 - (b) External loud speakers on the vessel are not in use;
 - (c) The vessel is within a designated anchorage or safe harbor during the night, except when transiting through the areas specified in the regulations; and
 - (d) Lighting on the vessels is limited to navigational lighting necessary for safe operations.
4. The incidental take of Xantus's murrelet in the course of ongoing research and monitoring of this species by public agencies other than the Department and by private parties is authorized as long as the agency or private party provides a written progress report to the Department.